

THE HONORABLE BENJAMIN H. SETTLE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

EMILY TORJUSEN,

Plaintiff,

v.

NATIONAL RAILROAD PASSENGER
CORPORATION d/b/a AMTRAK; and
DOES ONE THROUGH FIFTY,

Defendants.

No. 3:18-cv-05785-BHS

**STIPULATION AND
PROTECTIVE ORDER**

Plaintiff(s), through their counsel in this or other related actions, and Defendant National Railroad Passenger Corporation (“Amtrak” or “Defendant”) hereby stipulate and agree to the entry of the following Protective Order regarding the Confidential Information more particularly described below. By stipulating to this Protective Order, Amtrak does not withdraw, waive, or otherwise compromise any position on discovery set forth in its pending motions for clarification of the Court’s prior discovery orders in this or certain other Related Cases arising out of the Subject Derailment. Plaintiffs enter into this stipulation on the understanding that it is required under the Court’s order compelling discovery from Amtrak, and will apply in this and other related cases or clients represented by Hildebrand McLeod & Nelson LLP and/or Breneman Grube Orehoski, PPLC.

STIPULATED PROTECTIVE ORDER - 1
CASE NO. 3:18-CV-05785-BHS

LANE POWELL pc
1420 FIFTH AVENUE, SUITE 4200
P.O. BOX 91302
SEATTLE, WA 98111-9402
206.223.7000 FAX: 206.223.7107

1 1. PURPOSES AND LIMITATIONS

2 Discovery in this action is likely to involve production of confidential, proprietary, or
 3 private information for which special protection may be warranted. This matter arises out of the
 4 December 18, 2017 derailment of Amtrak Cascades Train 501 near DuPont, Washington (the
 5 “Subject Derailment”). Requested discovery in this matter includes materials that have been
 6 submitted to the National Transportation Safety Bureau (“NTSB”) that may not yet be publicly
 7 available or are otherwise subject to an NTSB investigative hold pursuant to 49 CFR § 831.13.
 8 Additional requested discovery includes other materials that also qualify for protection under
 9 Fed. R. Civ. P. 26(c). Accordingly, the parties hereby stipulate to and petition the court to enter
 10 the following Stipulated Protective Order. The parties acknowledge that this agreement is
 11 consistent with LCR 26(c). It does not confer blanket protection on all disclosures or responses
 12 to discovery, the protection it affords from public disclosure and use extends only to the limited
 13 information or items that are entitled to confidential treatment under the applicable legal
 14 principles, and it does not presumptively entitle parties to file confidential information under
 15 seal.

16 2. “CONFIDENTIAL” MATERIAL

17 “Confidential” material may include the following documents and tangible things
 18 designated by one or more parties to be produced or otherwise exchanged. By setting forth the
 19 designations, neither party is agreeing such documents are in fact confidential nor waiving any
 20 right to challenge such designation as set forth below:

- 21 a. Event recorder data from the units involved in the Subject Derailment and
- 22 associated chain of custody information;
- 23 b. The passenger manifest;
- 24 c. The personnel files of the train crew;
- 25 d. Maintenance and inspection records of the equipment (power and control units
- 26 and rail cars) involved in the Subject Derailment;
- 27

1 e. Video and voice recordings involving the train crew, dispatchers, and other
2 involved Amtrak personnel from the day of the Subject Derailment;

3 f. Applicable train crew training manuals and related materials;

4 g. Agreements, memoranda, and safety analysis documents between Amtrak, the
5 State of Washington, the Federal Railroad Administration, or Sound Transit related to the
6 development of the Point Defiance Bypass and implementation of passenger rail service on the
7 Point Defiance Bypass; and

8 h. Post-incident drug and alcohol test results of the operating crew involved in the
9 Subject Derailment;

10 i. Other materials submitted to the NTSB in connection with its investigation of the
11 Subject Derailment or that would otherwise be subject to the investigative hold established by 49
12 C.F.R. § 831.13, but for which the NTSB no longer opposes production provided that such
13 production is pursuant to this Protective Order.

14 j. Plaintiffs' health care and employment records.

15 The parties may need to amend or revise the above definition of "Confidential Information" from
16 time to time as the NTSB's investigation and discovery in this matter continues. Nothing in this
17 Protective Order shall affect the investigative hold which remains in effect for additional
18 materials, including the items identified in the NTSB's October 10, 2018 letter regarding civil
19 discovery in matters arising out of the Subject Derailment.

20 3. SCOPE

21 The protections conferred by this agreement cover not only confidential material (as
22 defined above), but also (1) any information copied or extracted from confidential material; (2)
23 all copies, excerpts, summaries, or compilations of confidential material; and (3) any testimony,
24 conversations, or presentations by parties or their counsel that might reveal confidential material.
25 However, the protections conferred by this agreement do not cover information that is in the
26 public domain or becomes part of the public domain through trial or otherwise.
27

1 4. ACCESS TO AND USE OF CONFIDENTIAL MATERIAL

2 4.1 Basic Principles. A receiving party may use confidential material that is disclosed
3 or produced by another party or by a non-party in connection with this case for prosecuting,
4 defending, or attempting to settle litigation for any client they represent arising from this Subject
5 Derailment. Confidential material may be disclosed only to the categories of persons and under
6 the conditions described in this agreement. Confidential material must be stored and maintained
7 by a receiving party at a location and in a secure manner that ensures that access is limited to the
8 persons authorized under this agreement.

9 4.2 Disclosure of "CONFIDENTIAL" Information or Items. Unless otherwise
10 ordered by the court or permitted in writing by the designating party, a receiving party may
11 disclose any confidential material only to:

12 (a) the receiving party's counsel of record in this action, as well as employees
13 of counsel to whom it is reasonably necessary to disclose the information for use in this case or
14 other clients arising from the Subject Derailment;

15 (b) the officers, directors, and employees (including in house counsel) of the
16 receiving party to whom disclosure is reasonably necessary for this litigation, unless the parties
17 agree that a particular document or material produced is for Attorney's Eyes Only and is so
18 designated;

19 (c) experts and consultants to whom disclosure is reasonably necessary for
20 this litigation and who have signed the "Acknowledgment and Agreement to Be Bound" (Exhibit
21 A);

22 (d) the court, court personnel, and court reporters and their staff;

23 (e) copy or imaging services retained by counsel to assist in the duplication
24 of confidential material, provided that counsel for the party retaining the copy or imaging service
25 instructs the service not to disclose any confidential material to third parties and to immediately
26 return all originals and copies of any confidential material;

(f) during their depositions, witnesses in the action to whom disclosure is reasonably necessary and who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A), unless otherwise agreed by the designating party or ordered by the court. Pages of transcribed deposition testimony or exhibits to depositions that reveal confidential material must be separately bound by the court reporter and may not be disclosed to anyone except as permitted under this agreement;

(g) the author or recipient of a document containing the information or a custodian or other person who otherwise possessed or knew the information.

4.3 Filing Confidential Material. Before filing confidential material or discussing or referencing such material in court filings, the filing party shall confer with the designating party, in accordance with Local Civil Rule 5(g)(3)(A), to determine whether the designating party will remove the confidential designation, whether the document can be redacted, or whether a motion to seal or stipulation and proposed order is warranted. During the meet and confer process, the designating party must identify the basis for sealing the specific confidential information at issue, and the filing party shall include this basis in its motion to seal, along with any objection to sealing the information at issue. Local Civil Rule 5(g) sets forth the procedures that must be followed and the standards that will be applied when a party seeks permission from the court to file material under seal. A party who seeks to maintain the confidentiality of its information must satisfy the requirements of Local Civil Rule 5(g)(3)(B), even if it is not the party filing the motion to seal. Failure to satisfy this requirement will result in the motion to seal being denied, in accordance with the strong presumption of public access to the Court’s files.

5. DESIGNATING PROTECTED MATERIAL

5.1 Exercise of Restraint and Care in Designating Material for Protection. Each party or non-party that designates information or items for protection under this agreement must take care to limit any such designation to specific material that qualifies under the appropriate standards. The designating party must designate for protection only those parts of material, documents, items, or oral or written communications that qualify, so that other portions of the

1 material, documents, items, or communications for which protection is not warranted are not
 2 swept unjustifiably within the ambit of this agreement.

3 Mass, indiscriminate, or routinized designations are prohibited. Designations that are
 4 shown to be clearly unjustified or that have been made for an improper purpose (*e.g.*, to
 5 unnecessarily encumber or delay the case development process or to impose unnecessary
 6 expenses and burdens on other parties) expose the designating party to sanctions.

7 If it comes to a designating party's attention that information or items that it designated
 8 for protection do not qualify for protection, the designating party must promptly notify all other
 9 parties that it is withdrawing the mistaken designation.

10 5.2 Manner and Timing of Designations. Except as otherwise provided in this
 11 agreement (see, *e.g.*, second paragraph of section 5.2(a) below), or as otherwise stipulated or
 12 ordered, disclosure or discovery material that qualifies for protection under this agreement must
 13 be clearly so designated before or when the material is disclosed or produced.

14 (a) Information in documentary form: (*e.g.*, paper or electronic documents
 15 and deposition exhibits, but excluding transcripts of depositions or other pretrial or trial
 16 proceedings), the designating party must affix the word "CONFIDENTIAL" to each page that
 17 contains confidential material. If only a portion or portions of the material on a page qualifies for
 18 protection, the producing party also must clearly identify the protected portion(s) (*e.g.*, by making
 19 appropriate markings in the margins).

20 (b) Testimony given in deposition or in other pretrial proceedings: the parties
 21 and any participating non-parties must identify on the record, during the deposition or other
 22 pretrial proceeding, all protected testimony, without prejudice to their right to so designate other
 23 testimony after reviewing the transcript. Any party or non-party may, within fifteen days after
 24 receiving the transcript of the deposition or other pretrial proceeding, designate portions of the
 25 transcript, or exhibits thereto, as confidential. If a party or non-party desires to protect
 26 confidential information at trial, the issue should be addressed during the pre-trial conference.
 27

(c) Other tangible items: the producing party must affix in a prominent place on the exterior of the container or containers in which the information or item is stored the word “CONFIDENTIAL.” If only a portion or portions of the information or item warrant protection, the producing party, to the extent practicable, shall identify the protected portion(s).

5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent failure to designate qualified information or items does not, standing alone, waive the designating party’s right to secure protection under this agreement for such material. Upon timely correction of a designation, the receiving party must make reasonable efforts to ensure that the material is treated in accordance with the provisions of this agreement.

6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

6.1 Timing of Challenges. Any party or non-party may challenge a designation of confidentiality at any time. Unless a prompt challenge to a designating party’s confidentiality designation is necessary to avoid foreseeable, substantial unfairness, unnecessary economic burdens, or a significant disruption or delay of the litigation, a party does not waive its right to challenge a confidentiality designation by electing not to mount a challenge promptly after the original designation is disclosed.

6.2 Meet and Confer. The parties must make every attempt to resolve any dispute regarding confidential designations without court involvement. Any motion regarding confidential designations or for a protective order must include a certification, in the motion or in a declaration or affidavit, that the movant has engaged in a good faith meet and confer conference with other affected parties in an effort to resolve the dispute without court action. The certification must list the date, manner, and participants to the conference. A good faith effort to confer requires a face-to-face meeting or a telephone conference.

6.3 Judicial Intervention. If the parties cannot resolve a challenge without court intervention, the designating party may file and serve a motion to retain confidentiality under Local Civil Rule 7 (and in compliance with Local Civil Rule 5(g), if applicable). The burden of persuasion in any such motion shall be on the designating party. Frivolous challenges, and those

made for an improper purpose (*e.g.*, to harass or impose unnecessary expenses and burdens on other parties) may expose the challenging party to sanctions. All parties shall continue to maintain the material in question as confidential until the court rules on the challenge.

7. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER LITIGATION

If a party is served with a subpoena or a court order issued in other litigation that compels disclosure of any information or items designated in this action as “CONFIDENTIAL,” that party must:

(a) promptly notify the designating party in writing and include a copy of the subpoena or court order;

(b) promptly notify in writing the party who caused the subpoena or order to issue in the other litigation that some or all of the material covered by the subpoena or order is subject to this agreement. Such notification shall include a copy of this agreement; and

(c) cooperate with respect to all reasonable procedures sought to be pursued by the designating party whose confidential material may be affected.

8. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

If a receiving party learns that, by inadvertence or otherwise, it has disclosed confidential material to any person or in any circumstance not authorized under this agreement, the receiving party must immediately (a) notify in writing the designating party of the unauthorized disclosures, (b) use its best efforts to retrieve all unauthorized copies of the protected material, (c) inform the person or persons to whom unauthorized disclosures were made of all the terms of this agreement, and (d) request that such person or persons execute the “Acknowledgment and Agreement to Be Bound” that is attached hereto as Exhibit A.

9. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE PROTECTED MATERIAL

When a producing party gives notice to receiving parties that certain inadvertently produced material is subject to a claim of privilege or other protection, the obligations of the

1 receiving parties are those set forth in Federal Rule of Civil Procedure 26(b)(5)(B). This
 2 provision is not intended to modify whatever procedure may be established in an e-discovery
 3 order or agreement that provides for production without prior privilege review. The parties agree
 4 to the entry of a non-waiver order under Fed. R. Evid. 502(d) as set forth herein.

5 **10. NON TERMINATION AND RETURN OF DOCUMENTS**

6 Within 60 days after the termination of this action, including all appeals, each receiving
 7 party must return all confidential material to the producing party, including all copies, extracts
 8 and summaries thereof. Alternatively, the parties may agree upon appropriate methods of
 9 destruction.

10 Notwithstanding this provision, counsel are entitled to retain one archival copy of all
 11 documents filed with the court, trial, deposition, and hearing transcripts, correspondence,
 12 deposition and trial exhibits, expert reports, attorney work product, and consultant and expert
 13 work product, even if such materials contain confidential material. All such material shall remain
 14 subject to the confidentiality obligations imposed by this agreement after the termination of this
 15 litigation.

16 The confidentiality obligations imposed by this agreement shall remain in effect until a
 17 designating party agrees otherwise in writing or a court orders otherwise.

18
 19 **IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.**

20
 21 DATED: March 21, 2019

s/ Carole M. Bosch

Carole M. Bosch, WSBA No. 53844
 Attorneys for Plaintiff

23
 24 DATED: March 21, 2019

s/ Andrew G. Yates

Tim D. Wackerbarth, WSBA No. 13673
 Andrew G. Yates, WSBA No. 34239
 Warren E. Babb, WSBA No. 13410
 Attorneys for Defendant

1 PURSUANT TO STIPULATION, IT IS SO ORDERED

2 IT IS FURTHER ORDERED that pursuant to Fed. R. Evid. 502(d), the production of any
3 documents in this proceeding shall not, for the purposes of this proceeding or any other federal
4 or state proceeding, constitute a waiver by the producing party of any privilege applicable to
5 those documents, including the attorney-client privilege, attorney work-product protection, or
6 any other privilege or protection recognized by law.

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8 Dated this 26th day of March, 2019.

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12 BENJAMIN H. SETTLE
13 United States District Judge
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EXHIBIT A

ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

I, _____ [print or type full name], of
_____ [print or type full address], declare under penalty
of perjury that I have read in its entirety and understand the Stipulated Protective Order that was
issued by the United States District Court for the Western District of Washington on
_____ [date] in the case of _____. I agree to comply with and to be
bound by all the terms of this Stipulated Protective Order and I understand and acknowledge that
failure to so comply could expose me to sanctions and punishment in the nature of contempt. I
solemnly promise that I will not disclose in any manner any information or item that is subject
to this Stipulated Protective Order to any person or entity except in strict compliance with the
provisions of this Order.

I further agree to submit to the jurisdiction of the United States District Court for the
Western District of Washington for the purpose of enforcing the terms of this Stipulated
Protective Order, even if such enforcement proceedings occur after termination of this action.

Date: _____

City and State where sworn and signed: _____

Printed name: _____

SIGNATURE: _____